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IN THE

Supreme Court of the United States

October Term, 1964

No. 420

RAYMOND COHEN,
JOHN JOSEPH ELCO,
JOSEPH E. HARTSOUGH,
ABRAHAM D. BERMAN,
Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

BRIEF OF COMMONWEALTH OF PENNSYLVANIA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COMMONWEALTH OF PENNSYLVANIA,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF IN OPPOSITION FOR RESPONDENT, THE COMMONWEALTH OF PENNSYLVANIA

Respondent, the Commonwealth of Pennsylvania, prays that the Petition for a Writ of Certiorari to review the Order of the Supreme Court of Pennsylvania, entered on May 27, 1964, be denied.

STATEMENT OF THE CASE

On September 18, 1959, seven officials and employees of Local 107 of the International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America were indicted for conspiracy to cheat and defraud that Union. After extensive pre-trial proceedings, six defendants were brought to trial on March 25, 1963, with the action being

abated as to one defendant who had died. Extensive evidence was presented by the Commonwealth in a trial that lasted ten weeks and one day in which 98 witnesses testified and 1,116 exhibits were introduced into evidence. The printed record in this case, exclusive of exhibits, runs 4,540 pages. No defendant took the stand, and no evidence was presented on behalf of any defendant.

On June 3, 1963, the jury returned verdicts of guilty as to all the defendants. In due course, the defendants were sentenced to terms of imprisonment ranging from three to twenty-three months to one to two years, plus a fine of $500.00. These Petitioners were sentenced as follows:

1. Raymond Cohen, the secretary-treasurer and key figure in the conspiracy, was sentenced to one to two years in prison and fined $500.00.

2. Joseph E. Hartsough was sentenced to six to twenty-three months in prison.

3. John Joseph Elco was sentenced to 3 to 23 months in prison.

4. Abraham D. Berman was sentenced to 3 to 23 months in prison.

Following the conclusion of the trial, this procedural timetable followed:

1. Arguments on post-trial motions were heard on July 10, 1963.

2. Defendants' post-trial motions were dismissed on July 15, 1963 and the judgments of sentence were imposed.

3. Defendants appealed to the Superior Court of Pennsylvania on July 15, 1963.

4. On July 19, 1963 and August 13, 1963 defendants filed petitions for continuance in the Superior

Court. On July 19, 1963 and August 15, 1963 the Commonwealth of Pennsylvania filed Answers to those petitions opposing a continuance.* The Superior Court denied both petitions for continuance.

5. The Superior Court of Pennsylvania heard argument for a full day on September 9, 1963 in a session which began at 10 A. M. and ended at 4:50 P. M. with no other case being heard that day.

6. On March 19, 1964 the Superior Court of Pennsylvania affirmed all the convictions by a six to one vote, and a comprehensive 37 page opinion was filed by that Court dismissing all of defendants' allegations of error. *Commonwealth v. Cohen et al.*, 203 Pa. Super. 34 (1964). One Superior Court Judge dissented on narrow state-law-substantive grounds that the prosecution was barred by the Pennsylvania Statute of Limitations.

7. After the Supreme Court of Pennsylvania refused, in its discretion, to review this case, this Petition for a Writ of Certiorari was filed.

REASONS FOR DENYING THE WRIT

ARGUMENT

I. This Case Presents No Federal Question and No Important Issue of Any Kind.

There is no legitimate federal question involved in this case. All of the issues raised by Petitioners in the Superior Court were argued in terms of substantive or procedural

* While the Petitioners printed copies of their applications for continuance at page 41a and 50a of the Joint Appendix to Petitions for Writ of Certiorari to the Supreme Court, Petitioners did not print the Commonwealth's Answers. So that this Court may have all the facts, the Commonwealth is including its Answers to those Petitions in a separate Appendix to Briefs In Opposition to Petitions For Writ of Certiorari, which is being filed with this Brief.

questions of Pennsylvania state criminal law. An examination of the specific issues raised in this Petition for Certiorari, set forth below, demonstrates that Petitioners are complaining about questions of state law which fall outside the ambit of jurisdiction of the Supreme Court of the United States.

As to these questions of state law, the Pennsylvania Superior Court has given these defendants their full day in (the Appellate) Court. Their numerous allegations of error have been comprehensively and conscientiously considered, and properly rejected.

The Pennsylvania Supreme Court refused to consider this case because there was not even any significant question of state law presented. Unlike the Supreme Court of the United States where four justices must concur before certiorari may be granted, the Pennsylvania Supreme Court will review a decision from the Pennsylvania Superior Court if any one of seven judges votes to do so. Pennsylvania Act of June 24, 1895, P. L. 212, § 7(e), 17 Purdon's Statutes 190. The lack of substance in Petitioners' complaints is indicated by the fact that not one of seven Pennsylvania Supreme Court Judges thought this case was worthy of review by that Court.

This case involves only a misdemeanor on which very moderate sentences were imposed, considering the nature of the conduct proved on the single bill of indictment charging conspiracy to cheat and defraud Local 107 of the Teamsters Union. This Court should not take time from its busy, crowded schedule to review this case which has a record in excess of 4,500 pages, where the Pennsylvania Superior Court has given full consideration to all the allegations of error on a case which, realistically viewed, involves only state-law issues.

II. The Specific Reasons Advanced by Petitioners Do Not Justify Review by This Court.

A. *Use of the District Attorney's Bill Was Proper; and in Any Event, It Involves Only a Question of State Law.*

It has long been settled that a defendant has no constitutional right to a preliminary hearing. *Lem Woon v. Oregon*, 229 U. S. 586 (1912). And approval of the procedure of instituting a criminal action on information filed by the prosecutor without a prior judicial determination of probable cause was reaffirmed in *Beck v. Washington*, 369 U. S. 541, 545 (1962). Petitioners have asserted that they had a right to a preliminary hearing under a Pennsylvania Act of Assembly, which is true as a general proposition subject to certain exceptions; and this case falls within one of the traditional exceptions under Pennsylvania law where no preliminary hearing need be held. The state law which governs the use of the District Attorney's Bill of Indictment is summarized in the opinion of the Pennsylvania Superior Court at pages 39 to 43 of 203 Pa. Super. There is no reason to summarize or restate the Pennsylvania law reviewed by the Superior Court in their opinion in this case. Applying Pennsylvania law on this subject to this case, the Pennsylvania Superior Court concluded that the District Attorney's bill of indictment was properly used. There is no federal question involved no matter what contortions are attempted to mold this hollow complaint into a Fourteenth Amendment issue.

The proceedings in the Pennsylvania Courts in this case, including the use of the District Attorney's Bill of Indictment, afforded Petitioners more than the minimum requirements of due process of law. As the record shows, Judge (then District Attorney) Victor H. Blanc obtained approval from the Court of Quarter Sessions, acting through President Judge Vincent A. Carroll, in securing

permission to present evidence to the Grand Jury without a preliminary hearing (10a). Judge Carroll's review of the District Attorney's action afforded Petitioners their first line of procedural protection. The Grand Jury then heard evidence for two days before returning the indictment in this case. These proceedings were, of course, only the preliminaries. Defendants were then tried by judge and jury with all of the traditional procedural safeguards.

Petitioners' current contention of prejudice is a phantom. At no time in the long trial or afterward have Petitioners claimed that they were surprised by any evidence at all or pointed to any harm caused by the absence of a preliminary hearing. On the contrary, the record shows Petitioners received notice, a chance to be heard, a full opportunity to defend themselves and all the other procedural safeguards guaranteed by the Due Process Clause of the Fourteenth Amendment.

B. *Petitioners Were Not Denied Due Process of Law by Sequestration of the Jury, Limitation on Peremptory Challenges, Introduction of Evidence, or the Trial Judge's Conduct.*

It is accepted federal, as well as Pennsylvania, practice for the trial judge to sequester the jury where the facts indicate that practice is necessary in order to insure a fair trial. Keeping the jury together is certainly not violative of due process of law. The facts before the Trial Court on April 1, 1963, provided ample cause for the action of the Trial Judge in locking up the jury. The following facts were found to exist at that time (1367a-1370a):

1. A nationwide television show was scheduled from 10 to 11 that evening on the Brinkley Journal which featured an expose of the National Teamsters including a film clip on Raymond Cohen. An advance script of that program had been obtained from the National Broadcasting System,

which script was reviewed by the Trial Judge in determining that the jury should be locked up.

2. The transcript of proceedings in the recent case of *United States v. Hoffa*, tried in the United States District Court in Nashville, Tennessee, disclosed flagrant efforts to tamper with that jury. That defendant and others were subsequently convicted on that charge. Transcripts of those hearings before Judge Wilbur E. Miller were reviewed by the Trial Judge and were considered in reaching his decision to lock up the jury.

3. An election had been scheduled by the National Labor Relations Board to determine whether the Teamsters or the AFL-CIO would represent Local 107 and three other Locals then affiliated with the International Brotherhood of Teamsters. At a prior election in November of 1962, there had been so much violence that the National Labor Relations Board ruled that a new election had to be held. In reaching the decision to sequester the jury, the Trial Judge considered the right of both the defendant and the Commonwealth (1369). The Pennsylvania Superior Court held his action was proper under Pennsylvania law; and it certainly was not so devoid of justification as to fall below the standards imposed by due process.

It has long been settled that due process of law is not violated where a State limits the number of peremptory challenges. In *Ashe v. Valotta*, 270 U. S. 424 (1926), Mr. Justice Holmes, in interpreting a Pennsylvania statute on peremptory challenges in a murder case, spoke for a unanimous Court which held that due process had not been denied, declaring: "That Pennsylvania could limit the challenges on each indictment to ten does not admit doubt." 275 U. S. at 426.

In fact, Petitioners conceded at page 11 of their Petition that there is no constitutional guarantee of peremptory challenges. Since their claim is based only on state law as embodied in a statute, that statute is certainly subject to

interpretation by the state courts in limiting a group of defendants to six peremptory challenges. Stated differently, if the Commonwealth of Pennsylvania can create the right to peremptory challenges, the state courts can limit that right in a case with joint defendants, since the constitution requires none.

The practical necessity for such a rule is demonstrated by the fact that it took the better part of two weeks of a ten week trial to select a jury in this case. If the law had allowed thirty-six peremptory challenges for the six defendants, and the time of jury selection had proceeded *pro rata*, approximately twelve weeks would have been consumed in the selection of the jury alone. Here again, Petitioners showed no prejudice since they were able to make certain that they received a fair trial by eleminating any prejudiced juror on a challenge for cause following extensive *voir dire*. A great deal of the voir dire was not printed since it was completely uneventful (4539a). The portion which was printed shows that the defendants were able to select an impartial jury which is the only important factor (1210a-1365a).

There is no substance to Petitioners' claim that prejudicial meetings were held where defendants' counsel were excluded. On one occasion the trial judge met with certain prospective witnesses who had been subpeonaed, their counsel who sought to have them excused and the Assistant District Attorney. As a result of that talk which was made a matter of record in this case, the Trial Judge restricted the prosecution from calling certain witnesses and prohibited certain questions (2688a-2721a). Defendants' counsel were fully informed of that relatively inconsequential matter; and the record indicates that defense counsel knew more about those particular witnesses than the prosecutor (2710a-2714a). In any event, it was the prosecution, rather than the defense, which was limited by that incident.

Petitioners make an unspecific complaint on limitation of their cross-examination of a witness, Marjorie Battis-

fore. Defendants sought to find out her address. In view of the fact that this witness was followed and harassed by a private detective hired by an attorney for one of the defendants, the Trial Judge's limitation was entirely proper and most necessary (4607a-4655a). The use of the cardboard charts was proper since a representative period was used; and as the record shows, the evidence fully supported the facts set forth on the charts (4071a-4138a). Petitioners' unspecific complaint about the Trial Judge's conduct requires only the comment that a review of the record on any specific issue will conclusively demonstrate that the Trial Judge acted entirely properly and that the Superior Court was correct when it complimented the Trial Judge on his patient handling of the case at page 75 of 203 Pa. Super. as follows:

> "Other complaints were made as to the admission of testimony and the injection of the judge into the trial of the case and as to parts of the court's charge. To individually discuss each and every one of these matters would unduly prolong an opinion which is already too long. Suffice it to say that we have carefully reviewed each and every one of these contentions and we do not believe that, taken together or separately, they were sufficient to show that the appellants were unduly prejudiced."
>
> "We are convinced that Judge Ullman retained his composure exceptionally well in a long drawn out, hard fought trial. We are also convinced that the evidence was sufficient to justify the conviction of all appellants and that they received a fair trial."

C. *Petitioners Rights Were Not Violated by the Superior Court's Refusal to Continue This Case.*

Petitioners did not contend in the Superior Court that they were denied the effective assistance of counsel by the Superior Court's orders denying a continuance. Petitioners'

efforts to now cast their request for a continuance in a constitutional setting is unfounded on the facts. There was ample time for the preparation of this case for argument in the Superior Court. The trial ended on June 3, 1963, and the argument in the Superior Court was held more than three months later on September 9, 1963. The notes of testimony had been transcribed on a daily basis. The case was heard in its regular turn in the normal processes of listings before the Superior Court.

The public's interest required a disposition of this case in the regular course of the listing of cases, without a continuance, in view of the key officerships and positions held by four of the defendants. The Superior Court noted, with approval, Judge Gold's comment at page 42 of 203 Pa. Super. of its opinion as follows:

> " 'Local 107 is a gigantic union with more than 12,000 members situate in the greater Philadelphia area. Its immense economic influence in the transportation and allied industries is well known. We have been and are now of the belief that Local 107 is a strong, powerful, self-disciplined and militant labor organization, which, concentrated in the field of transportation, is affected with a public interest no less than the utilities, railroads and trucking industry which it serves.' "

In view of the power of Local 107 in the economic life of the Philadelphia area and of the great influence of the defendants in that Union, it was necessary that the appeal be heard without a continuance and disposed of at the earliest date. The Superior Court processed this case like any other case on its list where convicted defendants remained on bail pending a disposition of their appeals. The Commonwealth's Brief in Opposition to Lapensohn's companion Petition contains additional argument on this issue in response to his specific contentions.

D. *All the Evidence Was Relevant on the Charge of Conspiracy to Cheat and Defraud Local 107.*

Petitioners' claim that evidence was admitted on crimes such as larceny, fraudulent conversion, embezzlement, extortion and threats of violence which were not encompassed within the indictment. All of the acts proved at trial related to the underlying conspiracy and showed *how* the defendants acquired control of the Union's treasury and the various *procedures* utilized to divert fraudulently the Union's money into their own pockets. While those acts may have constituted independent crimes as well, for which Petitioners could have been sentenced to very lengthy periods of imprisonment, all those acts were obviously germane to the charge in this case.

E. *The Holding of the Superior Court on the Statute of Limitation Issue Does Not Violate the Fourteenth Amendment.*

Like all of Petitioners' complaints, this is solely a question of state law which has been decided with finality by the Pennsylvania Superior Court. The time established by the Statute of Limitations and the interpretation of that statute is obviously a matter of state law. If Pennsylvania wished, it could establish a five year statute of limitations for conspiracy as it has for certain other criminal offenses. Acts of March 31, 1860, P. L. 427, §77; March 23, 1877, P. L. 26, §1; April 23, 1889, P. L. 48, § (19 Purdon's Statutes 211, 212, 214). Petitioners could not realistically contend that their constitutional rights were violated by a longer statute of limitations. Similarly, there is no logical basis for their complaint that their constitutional rights were violated by the Superior Court's interpretation of what that statute means.

On the facts, the Superior Court was obviously correct for the reasons summarized in their opinion at pages

59 to 65 of 203 Pa. Super. A key check on the Local 107 Bank Account was cashed on September 19, 1957, by one of the co-conspirators or an agent for a co-conspirator. Moreover, the evidence virtually demonstrated (and, in any event, was at least sufficient to support the jury's verdict) that co-conspirator Grace cashed the check himself on September 19, 1957. There are 222 checks in evidence where that bank required that bearer paper be endorsed by the person who received the cash. Thus, the evidence showed that Grace, one of the co-conspirators named in the indictment who died prior to trial, cashed the key check on September 19, 1957. That act was within two years of September 18, 1959, the time the bill of indictment was returned. As a matter of state law, it was the only sensible conclusion. Under any circumstance, such an interpretation of the state statute of limitations could not conceivably be violative of the Fourteenth Amendment of the United States Constitution.

CONCLUSION

The record shows that Petitioners were guilty as charged and that each received a fair trial. The allegations of error related only to state law problems. There was no violation of any constitutional right. Accordingly, the Petition For a Writ Of Certiorari should be denied.

Respectfully submitted,

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